Supreme Court, U.S
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No. 04 377

IN THE

Supreme Court of the United States

LINDA BRAGER,

Petitioner

v.

PAUL BRAGER

Respondent

On Petition for Writ of Certiorari
To The Court of Appeals of Maryland

PETITION FOR WRIT OF CERTIORARI

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Question Presented

I. Did the State Court err in disregarding the fundamental liberty interest of adult individuals to engage in private consensual sexual conduct recognized by this Court in *Lawrence v. Texas*, 539 U.S. 558 (2003)?

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OPINIONS AND ORDERS BELOW

The Corrected Order of the Maryland Court of Appeals denying reconsideration is reported at ___ A.2d ___, ___ Md. ___ (2004) and is reproduced in the Appendix at A1. The Order of the Maryland Court of Appeals denying the Petition for Writ of Certiorari is reported at 846 A.2d 401, 380 Md. 618 (2004) and is reproduced in the Appendix at A2. The Opinion of the Maryland Court of Special Appeals affirming the judgment below is unreported (No. 1715, Sept. term 2002) and reproduced in the Appendix at A3-A22. The Order of the Circuit Court for Baltimore County of September 18, 2002 is unreported and reproduced in the Appendix at A23-A24.

JURISDICTION

The Maryland Court of Appeals denied the Motion for Reconsideration of the Order denying the Petition for Writ of Certiorari by Corrected Order of June 18, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

Maryland Rule 8-131 in pertinent part provides:

> (a) **Generally.** The issues of jurisdiction of the trial court over the subject matter and,

unless waived under Rule 2-322, over a person may be raised in and decided by the appellate court whether or not raised in and decided by the trial court. Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.

STATEMENT OF THE CASE

A. The Parties, the Divorce Agreement and the Conduct

Petitioner Linda D. Brager and Paul E. Brager were married to each other in 1970 and divorced from each other on June 25, 1997. The parties entered into an agreement settling their divorce claims that was incorporated in their Judgment of Absolute Divorce. Among other things, the agreement provided that Ms. Brager would receive alimony in the amount of $2,500 per month from July 1, 1997 until the first to occur of any of certain specified terminating events. These terminating events included the death of either party, the remarriage of Ms. Brager, and Mr. Brager making 120 monthly payments of alimony to Ms. Brager.

The agreement between the parties contained in the Judgment of Absolute Divorce also included the following terminating event:

> The occurrence of ninety (90) "Events" in any one hundred eighty (180) day/night period. An "Event" is defined as any of the following: Plaintiff's sharing a common dwelling overnight with a man not related to her by blood or marriage; Plaintiff's otherwise residing with a man not related to her by blood or marriage who has no ownership interest in the property; and/or Plaintiff's cohabiting with a man not related to her by blood or marriage; provided however that only one "Event" may occur on any one day/night.

Ms. Brager appeared as the plaintiff in the divorce action.

At a point subsequent to the divorce, Petitioner both cohabited (engaged in sexual relations) and spent a number of overnights with a man unrelated to her by blood or marriage. The parties disagreed over the exact number of occasions of such events, and in February 2001, Mr. Brager ceased paying alimony to Ms. Brager, apparently relying on the cohabitation clause set forth above. Ms. Brager filed a Petition for Contempt on April 25, 2001. Ms. Brager filed an amended petition on February 27, 2002 to include a breach of contract claim and constructive trust claim.

On June 17 and August 28, 2002, the parties appeared before Judge Lawrence R. Daniels in the Circuit Court for Baltimore County, Maryland, for the trial of the enforcement of the alimony contract. In closing argument, Counsel for Petitioner raised the public policy implications of enforcing a contract clause that required a divorced woman to abstain from sexual contact in order to continue receiving alimony payments from her divorced husband.

Maryland's public policy disfavored the creation of cohabitation clauses that are operational solely based on sexual involvement. *Gordon v. Gordon*, 342 Md. 294, 675 A.2d 540 (1996). Nevertheless, on September 18, 2002, Judge Daniels issued an Order finding that Ms. Brager's conduct constituted the occurrence of a terminal event in the contract clause and declared Mr. Brager's alimony obligations terminated.

B. Appellate Court Proceedings

Petitioner appealed the orders of the Circuit Court for Baltimore County to the Maryland Court of Special Appeals. The parties filed their initial briefs, and Petitioner filed a reply brief invoking the Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), which had been decided less than one month beforehand. The parties appeared for oral argument before Judges Clayton Greene, Jr., J. Frederick Sharer, and Theodore G. Bloom (retired), where the public policy aspects of the case and the impact of *Lawrence* were addressed. The Maryland Court of Special Appeals issued an Opinion in the case on December 5, 2003, which affirmed the decision of the Circuit Court for Baltimore County.

In writing the opinion for the Maryland Court of Special Appeals, Judge Bloom avoided the public policy issue by claiming it had not been raised in the trial court, pursuant to Maryland Rule 8-131. Judge Bloom decided the appeal on other grounds, primarily contractual ambiguity, and affirmed the trial court's decision. The appellate judge disregarded the fact that the transcript clearly showed

Petitioner's counsel raising the public policy issue in closing argument, which is sufficient to invoke appellate review under Rule 8-131. The opinion is completely silent with regard to the impact of *Lawrence*.

The Petitioner filed a Petition for Writ of Certiorari with the Maryland Court of Appeals. The petition in large part focused on the issues of public policy in *Gordon* and the impact of *Lawrence*. The Petition was denied on April 12, 2004. Petitioner filed a motion for reconsideration with the Court of Appeals on May 10, 2004. The Court of Appeals denied the motion on June 18, 2004.

REASONS FOR GRANTING THE PETITION

The state courts of Maryland have attempted to restrict this Court's holding in *Lawrence v. Texas* by refusing to recognize the liberty interest of adult individuals to engage in private consensual sexual conduct. Other courts, including the state courts of Kansas and the federal courts of the Eleventh Circuit have likewise recoiled from the Court's hallmark decision illuminating the Constitution's protection of individual liberties. Such actions undermine the authority of this Court as the definitive interpreter of the Constitution and the protections it affords. The petition should be granted because the lower court decisions are fundamentally inconsistent with the Court's holding in *Lawrence v. Texas*.

1. THE MARYLAND COURTS ERRED IN FAILING TO RECOGNIZE THE FUNDAMENTAL LIBERTY INTEREST IDENTIFIED BY THE COURT IN *LAWRENCE V. TEXAS.*

Following the decision of the trial court in this case and the submission of Petitioner's Brief in the Maryland Court of Special Appeals, the Court decided *Lawrence v. Texas*. Petitioner sought to have both the Maryland Court of Special Appeals and the Maryland Court of Appeals recognize the impact of the Court's holding that adults have a fundamental liberty interest in private consensual sexual conduct. Both courts declined to review the case in that fashion.

In *Lawrence,* the Court recognized that the private consensual sexual conduct of adults is protected by a liberty interest under the Due Process Clause of the Fourteenth Amendment to the Constitution. The Court examined the substantive reach of liberty from the early cases of *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) and *Meyer v. Nebraska*, 262 U.S. 390 (1923) to the modern cases of *Griswold v. Connecticut*, 381 U.S. 479 (1965), *Eisenstadt v. Baird*, 405 U.S. 438 (1972), *Roe v. Wade*, 410 U.S. 113 (1973), and *Carey v. Population Services Int'l*, 431 U.S. 678 (1977). *Griswold* in particular established the privacy interest of the marital bedroom. 381 U.S. at 485. *Eisenstadt, Roe* and *Carey* clarified and confirmed that the privacy interest was not limited to married adults. In *Bowers v. Hardwick*, 478 U.S. 186 (1986), Justice John Paul Stevens in dissent echoed this view:

> [I]ndividual decisions by married persons, concerning the intimacies of their physical

> relationship, even when not intended to produce offspring, are a form of "liberty" protected by the Due Process Clause of the Fourteenth Amendment. Moreover this protection extends to intimate choices by unmarried as well as married persons.

478 U.S. at 216 (footnotes and citations omitted).

The Court in *Bowers* had placed limitations on the liberty interest of adults in their private sexual conduct by upholding a state's right to criminalize homosexual activity. *Lawrence* expressly overruled the holding in *Bowers*. In so doing, the Court noted pronouncements from a case decided subsequent to *Bowers*, *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), in which the Court identified constitutional protection for personal decisions relating to marriage, procreation and family relationships, among other things:

> These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.

505 U.S. at 851. Petitioner now asks the Court to continue the liberty interest carried from *Griswold* to *Lawrence*.

The particular facts of Petitioner's case place the conduct at issue squarely within the liberty interest set forth in *Lawrence*. Petitioner and a male acquaintance admittedly engaged in sexual activities and spent a number of nights together. The conduct was between adults, occurred in private and by consent of the individuals

involved. As a result, the conduct should receive the liberty protection afforded by the Due Process Clause of the Fourteenth Amendment.

The question arises as to how restriction of the protected conduct rises to the level of state action. The Petitioner and Respondent had entered into a private agreement for spousal support that was conditioned on Petitioner refraining from engaging in the constitutionally protected conduct. As a general rule, conduct between private individuals does not result in constitutional protection, and if the parties had merely addressed these issues between them, there would be no extension of the liberty interest recognized in *Lawrence*.

The constitutional issue arises because the Respondent sought the protection of a state court to relieve him of the obligation of the private contract. Respondent terminated the alimony payments under a belief that Petitioner had engaged in conduct that was protected by *Lawrence* but prohibited by the parties' private contract. When Petitioner sought the enforcement power of the state court, Respondent posed the conduct as the basis of both an affirmative defense and counterclaim against Petitioner. The actions of state courts and judicial officers in their official capacities is regarded as action of the state within the meaning of the Fourteenth Amendment. *Shelley v. Kraemer*, 334 U.S. 1 (1948). A judicial proceeding is no less a state action than the creation of statute by legislature or enforcement of regulation by the executive. When the state court judge and the appellate court judges took actions that denied Petitioner her protected liberty interest and condoned the restriction of that interest in exchange for dependent spousal support, the full power of the state was brought to bear in violation of the Fourteenth Amendment.

II. OTHER STATE AND FEDERAL COURTS ARE RESISTING THE APPLICATION OF THE COURT'S HOLDING IN *LAWRENCE V. TEXAS.*

Since the Court's decision in *Lawrence*, several other courts have struggled to address the liberty interest recognized by the Court. This Court remanded the case of *Kansas v. Limon*, 32 Kan.App.2d 369, 83 P.3rd 229 (2004) back to the Kansas Court of Appeals the day after deciding *Lawrence.* In January 2004, the Kansas court reached a decision, with the majority and concurring opinions refusing to apply Lawrence to the case, despite the obvious intention of the Court for such to occur and strong dissent.

The Eleventh Circuit Court of Appeals earlier this year also turned the holding of *Lawrence* on its head by contending that the Court did not even recognize a right to liberty under the Constitution. In *Lofton v. Sec. Of Dept. of Children and Family Servs.*, 358 F.3d 804 (11th Cir. 2004), the appellate court directly attacked *Lawrence* :

> We begin with the threshold question of whether *Lawrence* identified a new fundamental right to private sexual intimacy. *Lawrence*'s holding was that substantive due process does not permit a state to impose a criminal prohibition on private consensual homosexual conduct. The effect of this holding was to establish a greater respect than previously existed in the law for the right of consenting adults to engage in private sexual conduct. Nowhere, however, did the Court characterize this right as "fundamental."

. . .

> [I]t is a strained and ultimately incorrect reading of Lawrence to interpret it to announce a new fundamental right.

358 F.3d at 815-17. The Eleventh Circuit attempted to bolster its opinion in *Lofton* in an opinion just issued in *Williams v. Alabama*, 378 F.3d 1232 (11th Cir. 2004), a case in which the sale of sexual aids were banned by state law. Despite vigorous dissent, the majority opinions from the Eleventh Circuit Court of Appeals fall in line with the Kansas court's refusal to apply *Lawrence* in *Kansas v. Limon*.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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LINDA D. BRAGER*		**IN THE**
	*	**COURT OF APPEALS**
v.	*	**OF MARYLAND**
	*	**Petition Docket No. 613 September Term, 2003**
PAUL E. BRAGER	*	**(No. 1715, Sept. Term, 2002, Court of Special Appeals)**

Corrected

O R D E R

The Court having considered the motion for reconsideration filed in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the motion be, and it is hereby, denied.

/s/ Robert M. Bell
Chief Judge

Date: June 18, 2004

LINDA D. BRAGER	*	**IN THE**
	*	**COURT OF APPEALS**
v.	*	**OF MARYLAND**
	*	**Petition Docket No. 613 September Term, 2003**
PAUL E. BRAGER	*	**(No. 1715, Sept. Term, 2002, Court of Special Appeals)**

ORDER

Upon consideration of the petition for writ of certiorari to the Court of Special Appeals and the answer filed thereto in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert M. Bell
Chief Judge

Judge Greene did not participate in the consideration of this matter.

Date: April 12, 2004

UNREPORTED

IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1715

September Term, 2002

LINDA DIANE BRAGER

v.

PAUL EDWARD BRAGER

Greene,
Sharer,
Bloom, Theodore G.,
(Retired, specifically assigned)

JJ.

Opinion by Bloom, Theodore G.

Filed: December 5, 2003

This appeal by Linda Diane Brager is from an order of the Circuit Court for Baltimore County terminating the alimony payments that appellee, Paul Edward Brager, had been required to pay to appellant under a prior divorce decree. Appellant presents us with the following issues:

I. Did the Circuit Court judge err as a matter of law in interpreting the legal effect of the cohabitation clause in the parties' alimony agreement?

II. Did the Circuit Court judge err as a matter of law in enforcing an alimony termination provision that is void as a matter of public policy?

III. Did the Circuit Court judge clearly err in finding credible the testimony of Aaron Brager?

For the reasons that follow, we shall affirm the judgment of the circuit court.

FACTS AND PROCEEDINGS

The parties married in 1970 in Baltimore County, and thereafter established their marital home in Owings Mills. Three children were born of this marriage: Rachel Lynn Brager, Sarah Anne Brager, and Aaron Saul Brager.

After twenty-five years of marriage, appellant filed in the Circuit Court for Baltimore County a complaint for limited divorce. Appellee filed a counterclaim for limited, or in the alternative, absolute divorce.

On June 25, 1997, the court granted appellee's counterclaim for absolute divorce. Prior to the entry of their divorce decree, the parties reached an agreement with respect to the disputed issues in the divorce litigation. The Judgement of Absolute Divorce entered by the court

reflects the parties' agreement.

Of particular relevance to this appeal, the Judgment of Absolute Divorce included the following provision for spousal support:

> 3. Alimony
>
> Defendant shall pay to Plaintiff directly, in the method provided below, as alimony, tax deductible to Defendant and includable in the gross income of Plaintiff, the fixed and non-modifiable sun of Two Thousand Five Hundred Dollars ($2,500.00) per month commencing on July 1, 1997 and continuing until the first to occur of the following:
>
> a. Plaintiff's death;
>
> b. Defendant's death;
>
> c. Plaintiff's remarriage;
>
> d. The occurrence of ninety (90) "Events" in any one hundred eighty (180) day/night period. An "Event" is defined as any of the following: Plaintiff's sharing a common dwelling overnight with a man not related to her by blood or marriage who has no ownership interest in the property; Plaintiff's otherwise residing with a man not related to her by blood or marriage; and/or Plaintiff's cohabiting with a man not related to her by blood or marriage; provided however that only one "Event" may occur on any one day/night; and/or
>
> e. Defendant's having made one-hundred twenty (120) monthly payments pursuant hereto.

> Except for the alimony provided by this Paragraph 3, by virtue of their express waivers thereof, each of the parties be and hereby is DENIED ALIMONY now and that at all times in the future.
>
> The parties expressly having acknowledged that the provisions of this Paragraph 3 are intended to be a final and non-modifiable disposition of all alimony and/or spousal support rights as between them, it is further ORDERED AND DECLARED that this Paragraph 3 constitutes an "agreement" as contemplated by Md. Fam. Law Code § 8-103 (c) (1), (2) and therefore the provisions hereof shall not be subject to judicial modification in any respect.

The parties refer to this portion of their divorce decree as "the Events Clause." Hereinafter, so shall we.

Appellee paid support to appellant as provided in the divorce decree form the time of the divorce until the present dispute arose in 2001. In February 2001, appellee stopped paying alimony to appellant because he believed that appellant had violated Paragraph 3, subsection d of the parties' divorce decree.

In April 2001, appellant filed in the Circuit Court for Baltimore County a petition for contempt, later amended, alleging that appellee owed her alimony. In his response, appellee argued that his obligation to pay alimony had ended because there had occurred ninety "Events" within a one hundred eighty "day/night" period, as set forth in Paragraph 3, subsection d of the divorce decree. Appellee's decision to terminate the alimony payments was apparently based on receipt of knowledge that appellant had been living with her then-boyfriend, Mr. Anthony Pulaski,

the previous year.

Appellee also filed a counterclaim for breach of contract. He requested that the court order appellant to repay alimony received since she began living with Mr. Pulaski. Appellant responded to appellee's counterclaim, bu the proceedings were stayed because appellant filed a bankruptcy petition.

On June 17, 2002, appellant's petition for contempt came on for trial. Appellant testified that she and Mr. Pulaski were romantically involved for several months in 1999, and that during tht year Mr. Pulaski spent no more than thirty nights, either at her home in Baltimore County or at her condominium in Bethany Beach. This differed from appellant's deposition testimony, in which she stated that she and Mr. Pulaski resided together thirty to forty percent of the time between May 1999 and August or September 1999.

Mr. Pulaski also testified at trial. When asked by counsel for appellee how often he and appellant "resided overnight together" from June 1999 through January 2000, Mr. Pulaski responded "95 percent."

Appellee testified that he stopped paying alimony to appellant after learning, from a private investigator that he had hired, that appellant and Mr. Pulaski had been living together for approximately six months. A written report prepared by the private investigator and furnished to appellee apparently stated that the private investigator asked Mr. Pulaski directly whether he and appellant had lived together, and that Mr. Pulaski to confirm the investigator's report.

Over objection by appellant, the deposition testimony of Aaron Brager, the parties' youngest child, was also admitted into evidence. Aaron testified that appellant

and Mr. Pulaski lived together throughout the summer of 1999 and "all through the winter until I guess early 2000." He further testified that appellant and Mr. Pulaski lived together both in Baltimore County and in Delaware, and that Mr. Pulaski would "come over for dinners, just sort of spend quality time around the house. I didn't see him too often. I mean, I had a life of my own, you know, I went out, did my own thing. But you know, [Mr. Pulaski] was just around more is what I'm really trying to say."

At the conclusion of the trial, the court stated, in pertinent part:

> First of all, in a contempt proceeding, the
> alleged contender has the burden of proving the contempt by clear and convincing evidence. In this case, I think that all that Mrs. Brager had to do to make a prima facie case was to say what she said from the stand I didn't get paid, he had an obligation, there's a Court order, and it says he's required to pay me alimony. He didn't pay it.
>
> Now, that burden of producing evidence then shifts to Mr. Brager to show he has a defense. And his defense obviously is a violation of paragraph 3D here of the parties' agreement.
>
> Now, again, I complement Mr. Greene for his legal research. Quite frankly, my recollection of the Brown case is that residence really is an irrelevant term in the law in today's day and age. That residence is wherever you want it to be, wherever you contend it is. You can actually live most of the time in one place, but

if you have a mail box in another place, and you say that's where my residence is, then that's where my residence is.

> The Court has to look at the parties' agreement and apply the canons of contractual interpretation to it and first decide whether or not there's any ambiguity in paragraph 3D, and I find there is no ambiguity. As a matter of fact, the articulation of it goes to great lengths to spell out the types of events that are contingent under paragraph 3D, and I don't believe there is any room for doubt that residing with a person is living with them, not in the blunt sense, though again under that the blunt sense means is athermal [sic], but just living together, sharing a common dwelling overnight with the man not related by blood or marriage. Saying it otherwise, residing with the man not related to her by blood or marriage. Basically, I think the purpose of 3D is to take into account... every possible type of human interaction between a man and a woman other than one that was purely platonic or commercial for the purpose of determining when alimony should be terminated.
>
> * * *
>
> In judging this case, I take a step back. Instead of attempting to judge the motivation of people in terms of this question or that question, and as both counsel asked me to do, I look at the bigger picture, and in the bigger picture, we see Mr. Pulaski and Mrs. Brager coming together sometime the end of March,

spending many weekends down in Ocean City together at Mrs. Brager's residence there. We hear that they are living together here or spending many nights together here in Baltimore County. And then we hear that they actually opened a business together in January– in January of the next year. Now, Mrs. Brager says well, they broke up their relationship – if there was a romantic relationship, broke up sometime in September or October.

> The Court finds it very hard to believe that two people who broke up romantically would still decide to stay together to put together this bar business, which did in fact open in January. Even if they stayed together, if they couldn't be together romantically, I would think, well the business deal certainly would unravel and it would never come to fruition, but it did come to fruition.
>
> So therefore, the Court finds as a matter of fact that these parties did in fact have a relationship from June of '99 until sometime in early January, 2000, and the Court finds, based on Mr. Pulaski's testimony, that in fact they did stay together for at least 90 nights under the terms as defined by the events in paragraph 3D, and it was probably more than 90.
>
> ***
>
> [T]he Court has no difficulty at all finding that Mr. Brager has met his burden f proving affirmatively that, in fact, Mrs. Brager and Mr. Pulaski did spend at least 90 nights together in the same residence. And based on those findings the Court therefore finds in

favor of the alleged contender, Mr. Brager as to the contempt citation, and finds in favor of him as to the claim for a breach of contract.

A written order embodying the court's judgment was thereafter entered onto the docket. This timely appeal followed.

We shall included additional facts in our discussions as necessary.

DISCUSSION

Standard of Review

"In an appeal from a bench trial, 'we review the case on both the law and the evidence.'" *Green v. Bellerive Condos. Ltd. P'ship*, 135 Md. App. 563, 570 (2000), cert. denied, 363 Md. 206 (2001), cert. denied, 534 U.S. 824 (2001) (quoting Md. Rule 8-131 (c)). We "will not set aside the judgment of the trial court on the evidence unless clearly erroneous." Md. Rule 8-131(c). "'[I]f "competent material evidence" supports the trial court's findings, we must uphold them and cannot set them aside as "clearly erroneous."'" *Shofer v. Stuart Hack Co.*, 124 Md. App. 516, 527, cert. Denied, 354 Md. 331 (1999) (citations omitted). We will also "give due regard to the opportunity of the trial court to judge the credibility of the witnesses." Md. Rule 8-131 (c). "With respect to the lower court's application of the law to the facts, we apply the abuse of discretion standard." *Shofer*, 124 Md. App. At 527-28. Applying these principles, we will consider the court's analysis of appellant's claims.

Appellant contends that the language of the Events Clause is ambiguous and that the court erred in interpreting the clause. Appellee responds and that appellant did not preserve this contention for appellate review, see Md. Rule 8-131 (a), but that, in any event, appellant's argument is

without merit.

Contrary to appellee's assertion, this issue is properly before us. In its bench ruling, the court found: "The Court has to look at the parties' agreement and apply the canons of contractual interpretation to it and first decide whether or not there's any ambiguity in paragraph 3D, and I find there is no ambiguity." Because this issue "plainly appears by the record to have been... decided by the trial court," see Md. Rule 8-131 (a), we shall review it.

As we recounted in *Turner v. Turner*, 147 Md. App. 350, 402 (2002), this State "has long recognized and enforced spousal support agreements." "[A]n agreement between the parties as to alimony is subject to the same general rules of construction applicable to other contracts." *Id.* at 403.

> The construction of a written contract is a question of law, subject to *de novo* review by an appellate court. As a fundamental principle of contract construction, we seek to ascertain and effectuate the intention of the contracting parties. Moreover, 'the primary source for determining the intention of the parties is the language of the contract itself.' In this regard, contracts are interpreted 'as a whole to determine the parties' intentions.' Moreover, the terms of the agreement are construed consistent with their usual and ordinary meaning, unless it is apparent that the parties ascribed a special or technical meaning to the words.
>
> In ascertaining the parties' intent, Maryland follows the objective law of

contract interpretation. Under this doctrine, when a contract is clear and unambiguous, "'its construction is for the court to determine.'" Moreover, the court is required to 'give effect to [the contract's] plain meaning,'without regard to what the parties to the contract thought it meant or intended it to mean. Generally, "'it must be presumed that the parties meant what they expressed.'" Put another way, the "'test of what is meant is ... what a reasonable person in the position of the parties wold have thought' the contract meant."

Id. At 403-04 (citations omitted).

The principles of contract construction make clear that the court did not err in finding that the Events Clause, specifically that portion of the clause on which the court relied, "sharing a common dwelling overnight with a man not related to her by blood or marriage who has no ownership interest in the property," was not ambiguous. Indeed, appellant concedes as much in her brief. She states: "[T]he first alternative condition set forth in [Paragraph 3, subsection d] regarding "sharing a common dwelling overnight" is fairly clear." The plain language of the divorce decree reflects that the parties intended for the payment of alimony to cease upon the occurrence of ninety "Event" in any one hundred eighty day period. We need not reach te merits of appellant's argument that the second and third alternative prongs of Paragraph 3, subsection d of the divorce decree are ambiguous, because the court did not base its ruling on either of those alternatives.

II.

Appellant next argues that the court erred "in enforcing the anti-overnight clause that was void as against public policy." Appellee responds that appellant did not preserve this argument for appellate review. *See* Md. Rule

8-131 (a). We agree that appellant failed to preserve her argument concerning whether Paragraph 3, subsection d of the parties' agreement violated public policy.

Ordinarily, if an argument is not raised below, it is not preserved for appellate review. Heineman v. Bright, 140 Md. App. 658, 671 (2001), cert. Denied, 367 Md. 723 (2002); Md. Rule 8-131 (a). Rule 8-131 (a) is designed "'to ensure fairness for all parties in a case and to promote the orderly administration of law.'" *Davis v. DiPino*, 337 Md. 642, 647 (1995) (citations omitted).

As appellee points out, the only reference to public policy considerations in the record occurs during appellant's closing argument where counsel, "addressing the first prong of the events Clause, states that the provision 'raise[s] a particular question of public policy in terms of whether there should even be an enforceable termination clause' and that 'from a public policy point of view, perhaps this particular provision may not even be enforceable.'" In the absence of this issue having been litigated, much less ruled upon at the circuit court level, there is nothing for us to review on appeal. See Md. Rule 8-131 (a); *Heineman*, 140 Md. App. at 671.

III.

Appellant argues that the court abused its discretion in admitting as evidence the deposition testimony of Aaron Brager. We disagree.

In its case in chief, appellee called Aaron Brager to testify. The following colloquy occurred:

> Q. [BY COUNSEL FOR APPELLEE] Did [counsel for appellant explain to you what the issue was before Court today?
>
> A. [BY AARON BRAGER] Yeah, I'm pretty sure he did but I'm not clear in detail.

Q. Okay. When you appeared for your deposition, you thought that you were appearing because your mother asked you to come testify against Mr. Pulaski in some proceeding, correct?
A. Yes, that is correct.
Q. And the nature fo that dispute has to do with whether or not your mother resided with or had a relationship with Mr. Pulaski over a certain amount of time, over a given period of time, correct?
A. Yes.
Q. And you understand that if in fact she did, then your father doesn't have to pay alimony anymore, right?
A. Yes.
Q. If she didn't, then he has to pay alimony on a continuing basis, correct?
A. Yes.

***

Q. And at your deposition, you testified that in fact your mother and Mr. Pulaski lived together from the approximate period of June 1999, through the winter of 2000, correct?
A. Are you asking of that's what I said on my deposition?
A. Yes

***

Q. I'm asking you again, Mr. Pulaski and your mother were living together in June of '00, were they not?
A. I don't really think they were.

Q. What in your conversation with [counsel for appellant] or anything else between your deposition and today convinced you that, yeah, you don't think they were?
A. The fact that -- well, there were a few things. One is that during that time, I wasn't around all that much.
Q. Tell me what happened between then and now to convince you other than your testimony under oath in your deposition?
A. I just thought about the testimony that I had made. And you know, made some changes. I thought differently about it.

***

THE COURT: Pardon me for interrupting, but quite frankly, I think Mr. Brager should be advised of his constitutional rights in this case.

Following this colloquy, Aaron Brager exercised his Fifth and Sixth Amendment rights and refused to testify. Counsel for appellee thereafter sought the admission to Aaron's deposition testimony, pursuant to Maryland Rule 2-419. The court stated"

What I'll do, in all fairness to you, since I don't know that either party anticipated this turn of events, its I'll give you, over the lunch hour, to do any research you would like to do on the unavailability of the witness as it relate[s] to the addition of deposition testimony, and the Court will make a ruling after you have had an opportunity -- after both counsel have had an opportunity to do any research they care to

do to present any argument they would like to present to the Court in that regard.

At the outset of its afternoon session, the court heard argument from counsel regarding the admissibility of Aaron Brager's deposition testimony. After hearing argument, the court stated:

> The Court is going to find that the deposition testimony is admissible, again without any discussion of the weight to be given the evidence based on Rule 2-419[(a)(3)]E.
>
> ***
>
> These are, as far as I'm concerned, exceptional circumstances. The witness refuses to testify, and therefore, deprives a party of the benefit of the witness' testimony. Certainly, it's in the interest of justice to have that evidence presented, the witness' testimony presented to the Court and, assume, noting that the deposition was taken under oath in the same case with both parties being present, either personally or through counsel, the Court finds that it certainly meets the requirements for reliability that testimony in general should have when it is, or prior testimony in general should have, when it's substituted for actual in-court testimony.
>
> So accordingly, the Court will admit that portion of the deposition -- not the whole deposition -- certainly, but that part that deals with the testimony of Mr. Brager's refusal to give testimony here today.

The court did not err in admitting the deposition testimony of Aaron Brager. The court found that Aaron was unavailable to testify, within the meaning of the term in the Maryland Rules, because he had invoked his Fifth and Sixth Amendment rights. " ' Under Md. Rule 2-419(a)(3), a deposition in lieu of live testimony is admissible when the deponent/witness is unavailable to testify at trial and the party against whom the deposition is being used was present at the deposition or at least had notice of it.' " *Attorney Grievance Comm'n v. Gallagher,* 371 Md. 673, 703 (2002) (citation omitted). The deposition testimony is admissible, pursuant to subsection (E) of the rule, if the court finds: "upon motion and reasonable notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used."

Appellant cites no authority, and we have found none, prohibiting the court from admitting the deposition testimony of Aaron Brager under the "exceptional circumstances" attendant here. Instead, appellant argues that Rule 2-419 "requires that there be a motion and reasonable notice in order to admit the deposition testimony at trial," and that because "no actual motion was made prior to trial, nor was there time afforded ample enough to thoroughly research the issue and compose a cohesive argument opposing the admissibility of the deposition testimony, the court abused its discretion in admitting portions of Aaron's deposition. We disagree.

Rule 2-149(a)(3)(E) requires that the party offering the deposition do so "upon motion." The rule does not require, as appellant suggests, that the motion be made prior to trial. The record reflects that immediately after

Aaron Brager invoked his Fifth and Sixth Amendment rights, counsel for appellee made a motion to admit his deposition testimony. It was then that the court gave counsel approximately ninety minutes to research the issue before entertaining argument. At the expiration of this time period, appellant did not request a continuance to conduct additional research or brief the issue, nor did counsel ask the court to reconsider its ruing two months later when the trial concluded.

Appellant next suggests that the court erred in "finding the [deposition] testimony of Aaron Brager to be credible." We again perceive no error. "It [is] clearly the province and responsibility of the court to assess and weigh the testimony of the witnesses." *Turner*, 147 Md. App. at 385. The court's bench ruling reflects that it carefully considered the testimony of the witnesses and made certain findings with regard to each. There is simply no reason to disturb those findings.

Appellant's final challenge goes to the court's decision to exclude the expert testimony of Dr. James McTamney, a psychologist. Appellant argues that Dr. McTamney's testimony would have "provide[d] the court with some insight as to Aaron Brager's capacity to perceive, remember, and communicate, both to assist in evaluating the weight and meaning of his deposition testimony as well as to evaluate his ability to comprehend and properly evaluate his need to invoke the Fifth Amendment privilege." We disagree.

""""The general rule in Maryland is that all evidence that is relevant to a material issue is admissible except as otherwise provided by statutes or by rules applicable in Maryland courts."""" *Bern-Shaw Limited Partnership v. Mayor & City Council of Baltimore*, ___ Md. _____,

September Term, 2003, slip op. at 12 (filed October 8, 2003) (citations omitted). " ' "Relevant evidence may be excluded if the trial court [] believes that its probative value is substantially outweighed by the dangers of unfair prejudice." ' " *Id.* (citations omitted); see also Md. Rule 5-403.

> Appellate reviews of a trial court ruling on the admissibility of evidence often is said to be based on the standard that such a ruling is 'left to the sound discretion of the trial court.' so that 'absent a showing of abuse of that discretion, its ruling [] will not be disturbed on appeal.' Application of that standard, however, depends on whether the trial judge's ruling under review was based on a discretionary weighing of relevance in relation to other factors or on a pure conclusion of law. When the trial judge's ruling involves a weighing, we generally apply the more deferential abuse of discretion standard. On the other hand, when the trial judge's ruling involves a pure legal question, we generally review the trial court's ruling de novo.

Id. at 12-13 (citations and parenthetical explanations omitted).

As a rebuttal witness, appellant sought to call Dr. McTamney who, in 1997, had completed an evaluation of Aaron Brager "for educational purposes." In calling Dr. McTamney as a witness, appellant hoped to present evidence explaining why Aaron Brager's testimony at the hearing, before invoking his Fifth and Sixth Amendment rights, seemed to differ from his deposition testimony,

which, as we have said was admitted into evidence in lieu of his live testimony.

Over objection, appellant proffered that Dr. McTamney would testify that he conducted an educational evaluation of Aaron in 1997, and that the evaluation indicated that Aaron "had problems with the visual and spacial direction of language. He had ongoing difficulties and a slow processing problem. In other words, he would ponder and respond slowly. In short, he had a learning disability in terms of his cognitive functions for comprehension." Appellant further proffered that Dr. McTamney would testify "that the slow processing problem could result in Aaron becoming confused with the question, failing to adequately comprehend questions asked of him -- that might render his responses unreliable."

After hearing arguments of counsel regarding the admissibility of Dr. McTamney's testimony, the court stated:

> Rule 5-403, gives the Court the discretion to exclude relevant otherwise admissible evidence if its probative value is substantially outweighed by the risk of unfair prejudice, confusion or waste of time. And quite frankly, I believe it would be a waste of time to have Dr. McTamney come into court and testify as to what Aaron Brager told him and what his conclusions may have been, and Aaron Brager's mental state in terms of the individual education placement program as it relates to his testimony at his deposition and in court here today.
>
> [Aaron] appeared to have absolutely

no difficulty whatsoever understanding the questions that were presented to him. Granted, he had some difficulty understanding the concept of his Fifth Amendment rights, but as I already indicated, that is a rather complicated concept.

* * *

> But again it seems to me that the fact that he was unsure about his Fifth Amendment rights does not in any way impinge upon his ability to view, understand and testify about matters such as the matters that are before this Court, namely whether or not his mother had someone living with her.

The court did not abuse its discretion in prohibiting the introduction of Dr. McTamney's testimony into evidence. In our view, this evidence was of marginal relevance to the issue before the court, namely, whether appellant had violated the terms of the divorce decree. Moreover, appellant did not proffer that Dr. McTamney's testimony would call into question Aaron's ability to observe the surrounding in which he lived, or Aaron's ability to be truthful.

In sum, the court did not err or abuse its discretion in terminating appellee's obligation to pay alimony to appellant.

JUDGMENT AFFIRMED. COSTS TO BE PAID BY APPELLANT.

LINDA DIANE BRAGER	*	IN THE
Plaintiff	*	CIRCUIT COURT
v.	*	FOR
PAUL EDWARD BRAGER	*	BALTIMORE COUNTY
Defendant	*	Civil No. 03-C-95-9777

* * * * * * * *

ORDER

The within matter having come before the Court for trial on the Complaint for Contempt filed herein by Plaintiff, Linda D. Brager, against Defendant, Paul E. Brager, on June 17, 2002 and August 28, 2002. Testimony having been taken and evidence having been received, the arguments of counsel and the premises considered, it is by the Circuit Court for Baltimore County, this 16th day of September, 2002, and the same is hereby **ORDERED** that:

1. The Court **FINDS** as a mater of fact that the actions of Plaintiff, Linda D. Brager, constitute the occurrence of a terminal event as to Defendant's obligation to pay alimony pursuant to Paragraph 3.d. of the Judgment of Absolute Divorce entered herein on June 24, 1997.

2. Accordingly, Plaintiff's Petition for Contempt be and hereby is **DENIED** and Judgment has been entered thereon in favor of Defendant, Paul E. Brager, for "costs."

3. Further in accordance with the finding of the Court as set forth above, the obligation of Defendant, Paul E. Brager, to pay alimony to Plaintiff, Linda D. Brager, in any amount or for any further term, be and hereby is

DECLARED TERMINATED, without any residual right or reservation in favor of Plaintiff as to alimony on account thereof or otherwise.

4. The within Order, and the Judgment entered herein in accordance with the findings set forth above, be and the same are each **WITHOUT PREJUDICE** to whatever rights Defendant may have relative to his Counterclaim pending herein by currently Stayed by the filing of the Plaintiff's bankruptcy proceedings.

_____

Lawrence R. Daniels, Judge

cc: Jonathan S. Greene, Attorney for Plaintiff
Steven M. Caplan, Attorney for Defendant